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Nos. 98-1716 and 98-1718

Supreme Court, U.S.
FILED
JUN 18 1999
CLERK

IN THE

Supreme Court of the United States

PENNY KOTTERMAN, *et al.*,
Petitioners,
v.
MARK W. KILLIAN, *et al.*,
Respondents.

LOUIS RHODES,
Petitioner,
v.
MARK W. KILLIAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

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BRIEF IN OPPOSITION OF RESPONDENT ARIZONA SCHOOL CHOICE TRUST, INC.

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STATEMENT OF THE PARTIES

The parties, Petitioner and Respondent, are fully set forth in the Petitions, pps. ii.

Pursuant to Supreme Court Rule 29.6, the Respondent Arizona School Choice Trust, Inc. does not have any parent or subsidiary corporations, but has an associated 501(c)(3) private non-profit corporation, Arizona School Choice Administration Corporation.

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BRIEF IN OPPOSITION OF RESPONDENT ARIZONA SCHOOL CHOICE TRUST, INC.

INTRODUCTORY STATEMENT

In this case the Arizona Supreme Court has upheld the constitutionality of a tax credit up to $500.00 against income taxes payable, granted to contributors to a private school tuition tax exempt organization under Internal Revenue Code Section 501(c)(3). The Court did so with a very clear and careful interpretation and application of the three-part principles of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The decision also carefully considered and applied *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) and *Mueller v. Allen*, 463 U.S. 388 (1983). There is no case whatsoever with which the decision here conflicts. Although Petitioners, and the Keegan Respondents attempt to paint this decision as one having broad implications for "school choice" legislation, it does not. It is an opinion which stands upon applicable Arizona constitutional and statutory provisions relating to education in Arizona; and upon a tax credit provision, a tax bill, Ariz. Rev. Stat. Ann. § 43-1089 and § 43-1089.01 (which were adopted together). There is no reason that this case need be reviewed. It will provide virtually no broadly-applicable clarification of Establishment Clause jurisprudence the Court might now believe to be necessary. The area in which it appears that this Court's attention may be required is for cases involving direct aid, such as school vouchers, or the direct provision of equipment or subsidy by the state through its revenues to private sectarian schools. Again, that is not this case.

STATEMENT OF THE CASE

In Arizona, the state is mandated by Constitution to provide education to the children of Arizona, "as nearly free as possible." Ariz. Const. Art. XI, Section 6. This

means that students cannot be charged fees for their education in the public schools. *Id.*; Arizona Attorney General Opinion 194-004, Arizona 1994. In addition, the state in turn requires that all children obtain education. Ariz. Rev. Stat. Ann. §§ 15-802 and 15-803.

For almost all of its history, Arizona discharged its responsibilities to educate its children through public schools built and operated by school districts. It has funded the expenses of those schools through *ad valorem* property taxes assessed by individual school districts, by revenues from state imposed sales taxes, and by revenues derived from state income taxes. Until very recently, a school district could charge tuition for any student it enrolled from outside its district.

Five years ago, the state adopted legislation establishing charter schools in order to "provide additional academic choices for parents and pupils." Ariz. Rev. Stat. Ann. § 15-181 (1994). More recently, the legislature of Arizona specified that children be allowed open enrollment to schools in any district without being charged tuiiton. Ariz. Rev. Stat. Ann. § 15-816.01(A) (1995). It was against this backdrop of evolving methods of providing education, always having to comply with the dictate that no fees could be charged to school children (and by extension, their parents), that the tax credit legislation at issue in this case was adopted.

Respondent Arizona School Choice Trust, Inc., (hereinafter "School Choice Trust") was established in 1992. Affidavit of John F. McVaugh, Jr., Appendix B to Response of Intervenor's Keegan, to Petition for Special Action (hereinafter "McVaugh Affidavit"). It is a private non-profit corporation established to provide privately funded scholarships for Arizona school children to attend the kindergarten or elementary school of their choice. School Choice Trust is a properly qualified non-profit organization, pursuant to Section 501(c)(3) of the

Internal Revenue Code of the United States. School Choice Trust is not affiliated with any religious organization or with any school. School Choice Trust was established because of its founders' "strong belief that real education reform will occur when parents are empowered to make educational choices for their children." McVaugh Affidavit.

When this case was brought before the Arizona Supreme Court, School Choice Trust was the only would-be school tuition organization within Arizona conducting a scholarship program. The record in that court demonstrated that scholarship funds available to School Choice Trust fell woefully short of meeting the demand for them. So, School Choice Trust decided at first to provide scholarships only for three years, but was unable to cut off those scholarships when that period ended. McVaugh Affidavit. Therefore, it committed to parents that it would continue providing scholarships as long as resources were available. Because of limited resources, at the time the case was before the Arizona Supreme Court, School Choice Trust was only able to provide scholarships in grades K-8. Many parents "beg us to continue the scholarships into high school, but we simply cannot afford to do so." McVaugh Affidavit, ¶ 6. School Choice Trust awards scholarships on a "first come first served" basis, and at the time of the litigation in Arizona, School Choice Trust had a waiting list of approximately 800 students. School Choice Trust has experienced an increase in demand for scholarships since the legislature passed the educational tax credit law. *Id.* at ¶ 8.

The names of the 800 students on the waiting list were coded for either public or private school,[1] but not by

[1] Remembering that School Choice Trust was established in 1992, and that tuition free, open enrollment for Arizona public school districts was not adopted until 1995, explains the necessity for such public versus private school classification.

race, religion, national origin, or familial status—at no time are applicants asked to disclose those facts. *Id.* at ¶ 9. The waiting list of applicants for scholarships is entirely unaffected by the individual school preferences of the child or the parents. Only if a scholarship becomes available, and the family is still interested, do the parents or guardians receive a longer application form, (Exhibit 3, McVaugh Affidavit), in which the parents are asked to indicate for the first time the school that their child hopes to attend. *Id.*, ¶ 10.

School Choice Trust plays no role in selecting the school that the recipients will attend. Usually, the families have already selected a school for their child. They will generally pick schools in their neighborhood. They will at other times choose schools where family members or friends send their children. McVaugh Affidavit, ¶ 12. The Petitioners focused upon the religious missions of the estimated 72% of private schools (or at least some selected publicly available mission statements and informational materials from a "sampling" of sectarian schools that were submitted to the Arizona Supreme Court), as the basis upon which to argue that the purpose of the private school tuition organizations' scholarships is to advance religion. However, School Choice Trust experienced a mix of different motivations cited by parents as criteria they used in selecting their children's schools. Parents named academic rigor, small class size and individual attention, religion, and discipline/order/safety as their top reasons to select a given school. McVaugh Affidavit, ¶ 15.

In 1997, the Arizona legislature adopted a bill providing tax credits to all taxpayers of the state of Arizona, for two different categories of payments or donations—donations to school tuition organizations and payments for public school extracurricular expenses. When these tax credit laws were enacted, no child attending a public

school could be charged tuition or fees for basic schooling. This was true irrespective of whether the child attended school in her own district, enrolled in another district pursuant to the "open enrollment" statute, or matriculated at a charter school. Thus, to adopt a tax credit for public school tuition would have been an empty gesture by the legislature. The first half of this tax enactment is quoted by both petitions in the "statutes involved" section of their petitions. The second half, dealing with tax credits for public school expenses, are briefly mentioned and discussed even though it was a major portion of the 1997 School Tax Credit bill.[2] The public school expense tax credit became Ariz. Rev. Stat. Ann. § 43-1089.01. It specified:

> A. For taxable years beginning from and after December 31, 1997, a credit is allowed against the taxes imposed by this title for the amount of any fees paid by a taxpayer during the taxable year to a public school located in this state for the support of extracurricular activities of the public school, but not exceeding $200.00.

In 1997, the state rate schedule to which tax credits would apply ranged from 2.9% of taxable income of up to $10,000.00, to a marginal rate of 5.17% of the amounts over $150,000.00. Ariz. Rev. Stat. Ann. § 43-1011 (West 1997). It is thus understandable that if the legislature wanted to accomplish substantial benefit to education derived from donations to private school tuition organizations, or for payments of public school fees for extracurricular activities, it would logically do so with a tax credit rather than a deduction. The making of a

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[2] The Kotterman Petition first refers to the public payment credit, on page 14 of its Petition, at the end of a footnote listing for the Court four different credits to taxpayers by the Arizona Tax Code of 100% of payments made for particular purposes. The Rhodes Petition similarly downplays the public school expense tax code.

$500.00 contribution would, if recognized as a deduction rather than a tax credit, provide a benefit of from only $14.50 (for an individual with $10,000.00 of taxable income) to $25.85 of monetary incentive (for an individual taxpayer at $150,000.00). Because of the very low income tax rate applicable in the state of Arizona, the selection of a tax credit instead of a deduction, for a desired policy decision to promote parents' choice in education was very logical and compelling.[3]

Petitioners necessarily based their attacks upon the school tax credit, in the court below, on a record describing school conditions, activities and behaviors of students, parents, school tuition organizations, donors, and others involved in education, all prior to the tax credit statute becoming effective. As the Arizona Supreme Court observed, Rhodes Pet. A-16,[4] no one knows what effect operation of the tax credit may have upon the prospects for additional secular private schools, and therefore for tax credits being claimed based upon donations which never benefit sectarian schools, even indirectly. As already indicated, the demand for scholarships to non-governmental schools from the School Choice Trust is very strong. School Choice Trust aspires to expand and help many more students in the state, and to provide scholarships for high school students as well as for primary school students. McVaugh Affidavit, ¶ 16. As then-head of

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[3] Petitioner Rhodes characterized the effect of this tax credit legislation as being larger, by also discussing the benefit that would flow to a federal taxpayer, who would receive a deduction, and therefore a larger benefit at the federal level because of the much higher applicable tax rates in the Internal Revenue Code. Of course, they do not argue, nor could they, that there is anything wrong with granting a deduction—either federal or state—for contributions made to 501(c)(3) organizations, whether they be religious or otherwise. *Walz v. State Tax Commission*, 397 U.S. 664 (1970).

[4] When discussing the opinion of the Arizona Supreme Court in this case, references to appendix pages are always to the *Rhodes* Petition, No. 98-1781.

School Choice Trust, McVaugh testified in his affidavit to the Arizona Supreme Court:

> I have a tremendous amount of respect for the families that seek out our scholarships. They will go to great lengths to guarantee that their children have the educational tools necessary to succeed. I believe that the educational tax credit will help these parents achieve that goal, by enabling them to find the resources necessary to secure a quality education.

McVaugh Affidavit, ¶ 17.

Thus, what Arizona has done, as the then-most recent step to improve education of its citizens, was the following:

> 1. Add the private school tuition-donation tax credit and the public school-expense tax credit, to its existing tax code and existing tax credits for other purposes, amounting to part or all of the amount expended;
>
> 2. Thereby add to (not create) the impetus for any Arizona taxpayer to make the payment for public school expenses; or to make a charitable contribution to private school tuition organizations, for scholarship funds;
>
> 3. Thereby to stimulate a growth in the funds available to private school tuition organizations, for use in granting scholarships to students desiring to attend private schools, secular and sectarian alike; and
>
> 4. To alleviate the burden, upon parents, of their children's attendance at private schools, secular and sectarian alike, which burden would not exist at all were they to send their students to a public school in their own district; a public school in another district; or a chartered (i.e. non-governmental but public) school.

No monies from the Arizona Dept. of Revenue go to the School Choice Trust organization. No money from the Arizona Dept. of Revenue's accounts go to the chil-

dren who attend private schools, nor to their parents. And no funds from the Arizona Dept. of Revenue accounts go to any secular or sectarian private schools attended by children who receive scholarships from school tuition organizations.

This action was brought before the Arizona Supreme Court directly, under a special procedure for direct intervention by that court, in cases of significant public importance. *See* Respondent Arizona Dept. of Revenue's Brief in Opposition, p. 6, n.6 (hereinafter "State's Brief"). The record before that court consisted of affidavits and exhibits.

The Petitioners comprised a group of citizens and taxpayers, presumably allied with the views of the entities identified with their cadre of counsel (*see* Petitions, cover). They directed their action against the Arizona Dept. of Revenue. Most of the Respondents, appearing in this Court along with Respondent Keegan were, for the most part, parents having children, and present or former public officials.[5]

Arizona School Choice Trust intervened as a Respondent, and is the one party most directly and substantially affected by the litigation. It is the only party that is a recipient of donations, the encouragement and increase of which was sought by the Arizona legislature's adoption of the tax credit bill.

As discussed at length in the Arizona Supreme Court Opinion, Petition A-21, *et seq.*, the tuition organization donation tax credit was challenged not only under the Establishment Clause of the First Amendment of the United States Constitution, but also under provisions of

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[5] Respondent Lisa Graham Keegan is the State Superintendent of Public Instruction, but who made her appearance as an intervenor also in a private capacity. Respondent Trent Franks was an Arizona legislator involved in the enactment of the private school scholarship donation credit and public school expense credit bill.

the Arizona Constitution, providing that "no public money or property shall be appropriated for or applied to any . . . support of any religious establishment," Ariz. Const. art. II, § 12, and that "no tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school. . .". Ariz. Const. art. IX, § 10. Petitioners also raised Arizona Const. art. IX, § 7, which prohibits the gift or loan of credit by the State to any individual, association or corporation.

The Arizona Supreme Court upheld the legislation, turning back the state constitutional challenge and the First Amendment Establishment Clause challenge. The Court commenced its Establishment Clause discussion by acknowledging that the test adopted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), applied. It therefore considered *seriatim*, whether the tuition organization contribution tax credit (1) served a secular purpose; (2) had the principle or primary effect of either advancing or inhibiting religion; and (3) fostered an excessive government entanglement with religion. Petition A-6. The Opinion below also recognized that other approaches have been considered by the Court, but believed that the "well-settled" *Lemon* standard provided an appropriate framework for its review. Petition A6, 7.

The Court had little difficulty in finding a secular purpose for the challenged litigation. It recognized that, as noted in *Mueller v. Allen, supra*, a secular purpose can be gleaned from the face of the legislation itself. Petition A-7. It also noted, however, the succession of educational innovations (discussed by us, *supra*) to which this legislation was a further addition, which strengthened its view that a secular purpose existed. (Indeed, if any further support needed to exist for the recognition that encouragement of private schools in itself is not unconstitutional and is an acceptable secular purpose, the entire recent emphasis on "school choice" provides that rein-

forcement.) The Court also had no question that there could be no "excessive government entanglement" discerned from this school tuition organization donation tax credit law. Petition A-21. As the Court said:

> The state does not involve itself in the distribution of funds or in monitoring their application. Its role is entirely passive. Taxpayers who choose to participate may deduct the amount of STO ["school tuition organization"] contribution on their tax returns. The STO operates free of government interference beyond insuring that it qualifies for Section 501(c)(3) tax exempt status and complies with state requirements." *Kotterman v. Killian,* Petition A-21.

As expected, the greater part of the Arizona Supreme Court's Establishment Clause analysis was directed to whether the primary effect of the legislation was either to advance or to inhibit religion. Petition A-9 to A-21. The Court properly focused on three aspects of this Court's Opinion in *Mueller, supra*: (1) whether the deduction [here, credit] in question was one of many allowed by the State; (2) whether it was open to all parents incurring education expenses; and (3) whether funds were available to a private sectarian organization "only as a result of numerous, private choices of individual parents." *Mueller, supra,* 463 U.S. at 396-400. Petition A-9.

The Court noted that the argument of the Petitioners was that tax credits were the "functional equivalent of depleting the State Treasury by a direct grant" while a tax deduction merely serves as "seed money." It disagreed. Petition A-10.

The Court discussed Petitioners' reliance upon *Committee for Public Education v. Nyquist.* It acknowledged that *Nyquist* said that the constitutionality of a tax benefit "does not turn in any event on the label we accord it" *Nyquist, supra,* 413 U.S. at 789: and observed that this statement from *Nyquist* was consistent with this Court's

earlier observation in *Lemon*, that the form of any tax measure must be examined "for the light that it casts on the substance." A-10, quoting 403 U.S. at 614. The Arizona Supreme Court acknowledged the Petitioners' argument that there are some mechanical differences between deductions and credits but concluded that such mechanical distinctions were really not constitutionally significant. Both credits and deductions ultimately reduce state revenues, both are intended to serve policy goals, and both clearly act to induce socially beneficial behavior by taxpayers. Petition A-10.

In discussing the two cases, *Nyquist* and *Mueller*, *supra*, the Arizona Court concluded that the New York deduction, dealt with in *Nyquist*, having a special statutory formula, was plainly designed to achieve a net per family gain irrespective of the amount of expense the parents would actually incur. Petition A-11, quoting 413 U.S. at 790. It observed that in *Mueller*, this Court recognized that the statute at issue in *Nyquist* involved thinly disguised tax benefits actually amounting to tuition grants to the parents of the children attending private schools. Petition A-11, quoting 463 U.S. at 394. The Arizona Court then analyzed the wording and effect of the Arizona School Tuition Organization Contribution Tax Grant and concluded that indeed the Arizona tax benefits were clearly part of the general Arizona tax regime, and that this one was "only one among many." Petition A-13, quoting *Mueller*, 463 U.S. at 396. The Court also concluded that the Arizona tuition donation credit, available not just to all parents but to all taxpayers who are willing to contribute to an organization like School Choice Trust, compared to *Mueller's* emphasis of the availability of the tax benefits to a broad class of recipients, overly fulfilled the "broad availability" prong of *Mueller*. Petition A-13. Finally, the Arizona Court's application of *Mueller* turned to the question of whether funds reached sectarian schools by virtue of "numerous

private choices" in contrast to direct state financial aid. Petition A-13, quoting 463 U.S. at 399. Because tuition funds only went to schools chosen individually by each parent, it found that to be the case.

The Arizona Court also found support in a recent school voucher case, *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S.Ct. 466 (1998). It noted that a school voucher program represented a more direct form of aid than the granting of a tax credit to a taxpayer who previously had made a donation to a group such as School Choice Trust, which in turn had made a scholarship available to a student, which in turn ameliorated the financial burden to the student's parents who had the responsibility to make the tuition payment to the child's private school. Noting the dissent's contention that *Jackson v. Benson*, *supra*, was distinguishable because of the fact that the Wisconsin legislation contained some restriction on the application of voucher monies' use for religious purposes, the Arizona Supreme Court disagreed, primarily in recognition of the fact that *Mueller* itself, "while disallowing a tax deduction for the cost of textbooks used for religious instruction, placed no restriction on the uses to which the schools could put tuition payments qualifying for the deduction. *See*, 463 U.S. at 390, n.1. In addition, the statute in *Mueller* contained no "opt out" provision or requirement that schools admit students without regard to religion . . ." Petition A-14, n.3. The Court concluded, we submit quite inevitably, that the Arizona School Tuition Organization Donation Tax Credit is more like the tax deduction in *Mueller* than the voucher program in *Jackson*, but noted that even *Jackson* placed no limits on the uses to which recipient schools could put the state aid, *ibid.*

The Arizona Court also responded to the Petitioners' urging upon it of the statistical breakdown of schools

that were sectarian, and again turned to *Mueller*, and its conclusion that this Court was loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claim benefits under the law. As the Arizona Court said, "We also cannot predict how this tax credit may affect the ratio of secular to sectarian private institutions in the State." Petition A-19. The Arizona Court also had before it the record, described *supra*, demonstrating that even for private sectarian schools, parents' choices were based as much on three other concerns as upon religious training itself, *i.e.*, academic rigor, class size, and the maintenance of good order and discipline. *See* page 5, *supra*.

In sum, the Arizona Court carefully considered the applicable precedents, and rendered a decision which is substantially based upon an immutable fact that is important to this Court's consideration of whether granting *certiorari* and deciding this case might yield a compelling precedent for multiple other cases involving the concept loosely referred to as "school choice." That immutable proposition is that public funds simply did not find their way into private sectarian schools. Accordingly, as we discuss, *infra*, this case is quite *sui generis*, and was decided upon a unique set of facts and a fairly unique tax credit statute.

REASONS FOR DENYING THE WRIT

The petitions labor mightily to overcome the immutable fact that no public monies found their way into the coffers of School Choice Trust, let alone the parents of students, let further alone getting into the hands of the persons operating private schools, sectarian or secular. These efforts are to no avail. In addition, the Keegan Respondents, in urging upon this Court, a grant of a *certiorari* in this case attempt unsuccessfully to categorize this case as one presenting both a clear conflict with

another case—*Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999) and presenting a case out of which this Court could fashion an opinion producing broadly applicable Establishment Clause law to the wide variety of cases referred to as "school choice" cases. This case simply does not provide such a conflict, nor does it provide a vehicle for such a broad exegesis of Establishment Clause law.

I. THE ARIZONA SUPREME COURT OPINION WAS A REASONED ANALYSIS AND APPLICATION OF *LEMON, NYQUIST,* AND *MUELLER,* TO THE FACTS OF THIS CASE. THE KOTTERMAN PETITION ARGUES MERELY THAT IT BELIEVES THE ARIZONA COURT WAS WRONG.

Virtually all parties agree that the Arizona Supreme Court not only purported to, but did, examine and apply the *Lemon* test to decide this case. Kotterman Petition, p. 5; Rhodes Petition, p. 7; State Brief in Opposition, p. 8.[6]

The Kotterman Petition raises only two justifications for asking this Court to grant *certiorari* in this case. First it says that the Opinion evidences "some confusion as to the teaching of *Nyquist* and *Mueller*." Kotterman Petition, pp. 7, 18. Second, it argues that the Arizona Court got it wrong, citing specific aspects of its discussions of *Nyquist* and *Mueller*. Its argument in fact demonstrates how faithfully the Arizona Supreme Court understood and followed *Lemon, Nyquist* and *Mueller*.

Kotterman Petitioners argued, p. 8, that a very significant aspect of *Nyquist* was the fact that the deduction there at issue was not related in amount to the actual expenditures by the beneficiaries, for tuition. As we have

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[6] The Keegan Respondents do not say so explicitly, rather, generally concluding that "the Arizona Supreme Court below accurately applied this Court's precedents." Keegan Respondents' Statement, p. 8.

already set forth, the Arizona Court noted and properly distinguished the nature of the *Nyquist* deduction from the tax credit here. The tax credit here is for no more than amounts which are used for scholarship tuition funds (except for a nominal administrative portion) and therefore necessarily does not benefit beyond the actual education expenses. At the parent level, even the nominal administrative reimbursement does not apply.

The Kotterman Petition argues, pps. 9, 11, that an important aspect of the *Mueller* test is that the deduction (or credit) be part of a genuine system of tax laws. The Arizona Court recognized and applied that criterion. Indeed, the Kotterman Petition clearly demonstrates to this Court just how substantial was the basis for the Arizona Court's conclusion. For the Kotterman Petition identified twelve different tax credits in the Arizona Tax Code, with the credits ranging from 5% to 75% of payments or contributions. Kotterman Petition, p. 12, n.4. It also recognized four additional tax credits in the Arizona Tax Code, granting 100% tax credits. Kotterman Petition, p. 14, n.5. The Arizona Court certainly had a well grounded basis to conclude that the tax credits challenged here were part of a genuine system of tax laws. Indeed, it is almost a matter of state law whether these tax credits are or are not part of a genuine system of tax laws; a fact which counsels leaving this conclusion in the hands of the Arizona Court.

The Kotterman Petition argued that an important part of the *Mueller* test was that any benefit to sectarian schools be the result of numerous private choices. Kotterman Petition, pps. 12, 17. Again, the Arizona Court explicitly recognized such was an important consideration, and found such private choices to in fact exist in the hands of numerous private individuals—the contributors who chose the STO to which to donate, and the students and families, who chose the schools.

It certainly must be said that the provision of Supreme Court Rule 10, which teaches that a petition for a writ of certiorari is rarely granted when the asserted error only consists of the misapplication of a properly stated rule of law, governs here. The Kotterman Petitioners' argument reaffirms that not only did the Arizona Supreme Court apply the properly stated rule of law, but it applied it correctly.

II. THE RHODES PETITION SEEK TO GROUND REVIEW UPON AN ASSERTION OF THE MOST EXTREME HYPOTHETICALLY APPLICABLE FACTS THAT CAN BE ENVISIONED. IT ALSO FATALLY CONFLATES PAYMENT OF TAX REVENUES AS BENEFITS, WITH DONATIONS OF PRIVATE FUNDS, WHICH ARE MERELY INCENTIVIZED BY A TAX CREDIT.

The Rhodes Petition most suffers from the effect of studiously ignoring the immutable fact here—that no state funds provide benefits to sectarian organizations. This misperception or misinformation begins with the very first page of the Rhodes Petition—in the question presented—which includes the issue "are the tax revenues paid to STO's public funds? And if so, do such violate the Establishment Clause." As recognized by the State's brief, p. 17, *et seq.*, this simply is not what this case is all about.[7]

The Rhodes Petition also suffers from a flaw arising from its apparent assertion that it is acquiescing in a facial constitutional challenge to the statute, rather than a challenge to the statute as applied, Rhodes Petition,

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[7] The Kotterman Petition suffers from a similar ambiguity in describing the true facts of this case. The Kotterman Petition's question presented asks whether the redirecting of funds from the state treasury to private, sectarian schools, violates the Establshment Clause of the First Amendment. It also argues that there is an issue here of a "fundamental choice—made by the state—about where these public funds will go." Kotterman Petition, p. 7. Neither is true.

p. 9, fn.6, when in fact its position derives from the extreme opposite. It urges the most extreme hypothetical facts antagonistic to upholding the law, and proceeds from them. The Rhodes Petition argued that the Arizona Supreme Court rejected the dissent's contention that the statute would be invalid if, in operation, it were used by religion-specific STO's to subsidize full tuition out of state funds for students of particular religions. *Id.* It then contends that unless the decision below is reversed no "as applied challenge to the statute based on its use to subsidize religious education out of state funds, will hereafter be possible in Arizona courts." *Id.* Petitioner Rhodes then states that he agrees with the decision to address the constitutionality of the tuition organization donation tax credit statute at this time; implying that he agrees the law should be measured against a facial challenge to its constitutionality. However, instead of presenting his position to this Court under the terms of a facial attack on constitutionality, he does something else altogether.

This Court has held that there are two quite different ways in which a statute may be considered invalid on its face—"because it is unconstitutional in every conceivable application" or because it is overly broad. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984). Stated another way, a facial challenge to a legislative act is the most difficult to mount successfully because "the challenger must establish that no set of circumstances exists under which the act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

What that should mean is that the tuition organization donation tax credit must be upheld if there can be conceived of any way that its operation would escape violation of the Establishment Clause. What the Rhodes Petition does, however, is to cite extreme (indeed hardly likely) hypothetical circumstances to support his argument

that this statute is unconstitutional, *see* Rhodes Petition, pps. 10, 11, hypothesizing circumstances of the state authorizing individuals simply to send their tax payments directly to a church or synagogue; or providing for a check off on the tax return so that some tax monies received by the state would be directed to such sectarian schools. Moreover, *see* Petition, p. 14, in which Petitioner Rhodes raises the possibility that 100,000 Arizona taxpayers could band together and collectively choose to support a specific religion's schools, rather than lend their support to the state's revenue needs. Thus, he argues, they could direct as much as $50 million of "state income tax revenues [sic]" each year, thereby requiring the state, supposedly, to fund a particular religious school. These are not the facts. These are not the sort of "every conceivable application" by which a facial challenge is to be measured. And the Petition completely ignores the far more likely (indeed to a large degree actually occurring) setting in which this law will be applied. That application consists of the facts that are in this record, particularly the facts pertaining to School Choice Trust's organization and administration of its Trust, to receive and distribute donations for school tuition.

The Supreme Court of Arizona did not explicitly indicate whether it was measuring the statute facially, or as applied. School Choice Trust's evidence, however, at the very least demonstrates that there is a very rational, very logical set of circumstances in which the statute may be applied, and which strongly supports the ruling below upholding the statute. One of the very important yardsticks of the Establishment Clause is whether benefits to private recipients are allocated on the basis of criteria that neither favor nor disfavor religion. *Agostini v. Felton*, 521 U.S. 203, 230-232 (1997). As described in the Statement of Case, *supra*, School Choice Trust, which begun its operations five years before the statute at bar was enacted, has a very clearly neutral operating proce-

dure. The interested families are placed on a waiting list without regard to religion or the particular school which they wish to attend. The scholarships are awarded on a first come first serve basis. School Choice Trust grants a scholarship to the school of the parents' choice.

The Rhodes Petition's argument that 100,000 citizens might organize and require that all of their tuition monies derived from donations fund tuitions to schools of only one religion, is probably inspired by the dissent's assertion that maybe school tuition organizations could discriminate on the basis of religion. Pet. A-47. It is not at all obvious that such is the case.[8]

Another argument heavily pressed in this case is the contention that *Mueller's* requirement of broad-based availability of the benefit is not complied with because the tuition organization donation tax credit established by § 43-1089 only covers donations for scholarship grants for private schools. It is argued both in the Petitions, *e.g.* Kotterman Petition, pps. 11, 15, n.9, and in the dissent, that because the provisions of § 43-1089 only ran to private organizations, there was no neutral extension of benefits (*i.e.*, to both private and public school situa-

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[8] The dissent's assertion was probably premised upon the fact that the definition of a School Tuition Organization only says that such organizations shall provide educational scholarships or tuition grants to students "without limiting availability to only students of one school," and does not prohibit such organizations to discriminate on the basis of religion. Ariz. Rev. Stat. Ann. § 43-1089(E)(2). And it also defines a qualified school as one which does not discriminate on various bases, not including religion. Ariz. Rev. Stat. Ann. § 43-1089(E)(1). However, it is possible to argue that because a school tuition organization must grant scholarships to children "to allow them to attend any qualified school of their parents' choice," Ariz. Rev. Stat. Ann. § 43-1089 (E)(2), the law should be interpreted to prohibit school tuition organizations to discriminate in their scholarship grants on the basis of religion; *i.e.* that once a child is otherwise accepted for a scholarship, the parents' choice of a school must be honored, irrespective what religion, if any, operates that school.

tions). However, the Arizona legislature concurrently provided for a $200.00 tax credit that was claimable for payment of fees or expenses for extracurricular activities at public schools. The dissent and the Petitioners say that because this is a smaller credit, and because it was for extracurricular expenses and not for payments to the general fund for defraying public school educational expenses, that there was not an equal availability of tax credits. To accept the argument would be to dignify form over substance.

As we described at the outset, the circumstances of the Arizona public school system, at the time the tax credit was adopted, was such that a school child could go to any school district's school that would take him or her, and could also go to charter schools if accepted by them, with no tuition or fees. The education is to be "as nearly free as possible." Ariz. Const. art. XI, § 6. And taxpayers already paid a considerable portion of their taxes for public education.[9] Thus, for the legislature to have done anything other than what it did, in order to purport to allow the school tuition organization donation tax credit, would have been an exercise in futility. And given that the basic cost of education is defrayed from taxes, granting $200.00 instead of $500.00 as a credit for payments of public school extracurricular activity expenses, is very logical.

There is another significant aspect of this situation, when assessing the constitutionality of the statute facially, or as applied against the facts of this case.

The state has a compelling interest in encouraging private schools to undertake the education of students. The Rhodes Petition, Appendix A-98, provides illuminating

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[9] In the 1997-1998 school year, state funds for operating expenses (not capital) totaled $3,407,819,835.00. (Arizona Superintendent of Public Instruction 1997-98 Annual Report, p. 36, compilation of table).

facts about the benefit of the state encouraging private schools to educate children. Based upon the number of scholarships granted in 1998 according to the Arizona Dept. of Revenue (381), and upon the total dollar amount of those scholarships ($187,275.00), Rhodes Petition A-98, for a tax credit of something less than $500.00, the state saves an average of $4,625.00 for each child that matriculates in a private school instead of a public school.[10] In other words, for accepting $187,275.00 worth of tax credits, for those 391 scholarships, the state government conserved more than ten times that amount—$1,808,375.00. Arizona Superintendent of Public Instruction 1997-98 Annual Report, p. 36. In other words, rather than to assess the motivation for and effect of this law by Petitioner Rhodes' speculation about the wild extremes of money that supposedly would be lost to the state under this school tuition organization donation tax credit, it is better viewed in light of what is known about actual conditions. At the very least, these are "conceivable applications" of this statute. The Petitioner Rhodes is in effect arguing for a Dr. Jekyll/Mr. Hyde version of facial analysis of the constitutionality of the statute.

The Rhodes Petition, (and the dissent below), make some hard-to-understand attacks on the statute. Petitioner Rhodes argues that the Wisconsin case discussed by the Arizona Supreme Court, *Jackson v. Benson,* 218 Wis.2d 835, 578 N.W.2d 602 (Wis. 1998) *cert. denied*, was distinguishable because the benefits "applied only to children of the poorest families." Rhodes Petition, p. 20. He also contends that another distinction is that in Wisconsin the benefit program was limited to only 15% of the students in the particular district. Why an otherwise

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[10] The average dollar value of a scholarship according to the Dept. of Revenue figures contained in the Rhodes Petition was $471.00. The average operating cost to educate one child in the 1997-98 school year was $4,625.00. Report, n.9, *supra.*

qualified neutrally-offered benefit, whose impact on a parochial school is highly attenuated by the multiple steps of the process, starting with the taxpayers' donation and ending with matriculation in a private school, should be reviewed by this Court due to its availability to the wealthy or to a larger potential populous of student beneficiaries than was true in Wisconsin, does not appear. Similarly, *see* dissent, p. A-58.

III. THE RHODES PETITION IS WRONG IN ARGUING THAT 21 LEGISLATIVE BILLS, JUST LIKE THE ARIZONA STATUTE ARE BEING CONSIDERED OR ADOPTED.

Petitioner Rhodes asserts, Pet., p. 22, n.12, that in April 1999, tuition tax credit legislation was pending in 14 states, with 21 pending bills. He then argues that *certiorari* should be granted in this case in order to declare the law that might be applicable to these many pending legislative bills. Consideration of these proposed bills, however, discloses that deciding this case will not materially clarify the law applicable to those as-yet unpassed laws.

Of the 21 legislative bills cited by Petitioner, 14 did provide tuition tax credits, but they were to be provided directly to parents who paid for their children's private school tuition and not to people who donated money to nonprofit organizations.[11] Thus the structure of such bills, even if any of them are ultimately adopted, is quite different from this one. No school tuition organizations are involved. Deductions or credits are not granted to charitable donors who provided the donations for the tuition. These are important factual distinctions, for considering attenuation of benefits to sectarian schools; the issues of

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[11] Arkansas (HB2159), Connecticut (HB5893, SB1132, SB636), Delaware (SB59), Hawaii (SB12), Illinois (HB999, SB1075), Indiana (SB633), Kansaas (HB2242), Maine (LV1380, LV1786), Nebraska (LB484), Utah (SB159).

whether benefit to sectarian schools is the result of many private individual choices; and upon "entanglement."

Oregon and Texas were the only states that proposed tax credits similar to Arizona's Statute such that individuals could receive tax credits for making contributions to student tuition organizations.[12] To date, the Oregon House Bill has not been passed by the Oregon House or the Oregon Senate, and has not been submitted to Oregon's Governor for signature. Oregon's Legislative Information Office indicates that the Oregon legislature will likely adjourn within the next month, and the bill in question has been stuck in a House Committee since May 5, 1999.[13]

Regarding the two Texas bills cited by Petitioner, the last day of Texas' 1999 Legislative Session was May 31, 1999, and both bills were left pending in committees at that time.[14] In all, 20 of the 21 bills cited by Petitioner either died in State Legislative Committees, were not passed by the other State Legislative House, or were never submitted to State Governors for signature before the end of the respective legislative sessions.[15]

It is argued, Kotterman Petition, p. 19; Rhodes Petition, p. 11, that a supposed uncertainty about the Establishment Clause law related to tax credits accounts for the

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12 Oregon (HB2597), Texas (HB99, HB3645).

13 Telephone interview, Administrative Assistant, Oregon Legislature Office of Policy and Research Committee Services, June 10, 1999.

14 Texas Legislature's Online Legislative Information Site, www.capitol.state.tx.us, accessed June 10, 1999.

15 Arkansas (HB2159), Connecticut (HB5893, SB1132, SB636), Delaware (SB59), Hawaii (SB12), Illinois (HB999, SB1075), Indiana (SB633), Kansas (HB2242), Maine (LV1380, LV1786), Missouri (SB74, SB3, HB29), Nebraska (LB484), Texas (HB99, HB3645), Utah (SB159), West Virginia (HB2824).

failure rate of these bills. Such an argument is unpersuasive. We have found no case after *Mueller*, *supra*, in which a tax credit of any similarity to the one involved in this case has been invalidated. Indeed, there have been numerous cases indicating liberality towards allowing private benefits, against Establishment Clause challenge, from as long ago as five years, *e.g. Campbell v. Manchester Board of School Director*, 641 A.2d 352 (Vt. 1994). In *Campbell*, the Vermont court held that paying tuition costs of local students to attend approved public or private schools did not violate the Establishment Clause. Indeed, one of the reasons this Court ought not to take this case is because it is a much easier case to uphold the constitutionality of this statute, than others that have been recently considered and rejected by this Court for *certiorari*, or have been accepted or are pending *certiorari*, where direct benefit payments do flow from state to private school.

IV. THE KEEGAN RESPONDENTS' ASSERTION THAT THE BAGLEY CASE FROM MAINE IS A SQUARE CONFLICT WITH THIS CASE AND WITH *JACKSON v. BENSON* FROM WISCONSIN, IS SIMPLY INCORRECT.

This case is also quite different from other Establishment Clause cases concurrently being decided, and brought before this Court, which cases are better vehicles for addressing current Establishment Clause issues.

The Keegan Respondents in their statement assert that the recent decision by the Maine Supreme Judicial Court, *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), conflicts with this case and with *Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 (Wis. 1998), *cert. denied* 119 S.Ct. 466 (1998).[16]

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[16] Presumably they would also contend that *Strout v. Albanese*, No. 98-1986, 1999 WL 329272 (1st Cir. 27 May 1999), also conflicts. *Strout* reviewed the same statute *Bagley* did and reached the same result.

The Institute for Justice, counsel of record for the Keegan Respondents in this case, represents several parties who ask this Court, to use their cases as a vehicle to attempt liberalization of Establishment Clause clearance for various state educational initiatives which they broadly categorize as "parental choice." Keegan Statement, p. 12, *et seq.* They urged this Court to accept *Jackson, supra*; but *certiorari* was denied. They urge this Court to accept this case. And they indicate that they will file a petition in *Bagley*. Keegan Statement, p. 9, n.8.

These cases differ substantially from this one. All three, *Jackson*, the Wisconsin case, and *Bagley* and *Strout*, arising from Maine, involve more direct tuition payment or voucher systems, and thus are very different from this case having what we have characterized as the "immutable fact", that no state money went to a sectarian private school. In addition, this Court has already indicated that *Jackson v. Benson, supra*, is unnecessary to review, having denied *certiorari*. To the extent that general principles in *Jackson v. Benson* were cited with approval by the Arizona Supreme Court in this case, the denial of *Jackson* implies a denial for this case.

The *Bagley* and *Strout* cases are distinguishable at yet another level from this case. In each, the appellate court was asked to decide an equal protection challenge, not a direct Establishment Clause challenge. The Maine legislature had amended its system of allowing direct payment of tuition to private schools, by school districts not having public high schools. The amendment removed sectarian schools, which had previously been approved and participated. The removal was prompted by an opinion from the Maine Attorney General that to continue direct funding of sectarian schools would violate the Establishment Clause. The Maine Supreme Judicial Court, and the First Circuit, both were asked to decide whether this was a reasonable basis. Indeed, as the concurrence of

Senior Circuit Judge Campbell in *Strout, supra*, establishes, when clearly understood, the issue is not whether a statute properly included direct subsidies paid to sectarian schools, but rather whether the Maine legislature acted constitutionally under the equal protection clause to the United States Constitution by excluding sectarian schools from the possibility of subsidies. Judge Campbell would use a rational basis equal protection test. Thus, not only are the Maine cases and the Wisconsin cases ones of direct aid and not indirect aid (which *Strout* recognizes presents a dichotomy which is "a recurring theme throughout Establishment Clause litigation") the Maine cases, if creating a situation calling for review by this Court should be the ones upon which to grant *certiorari*, because of their raising of the issue through an equal protection prism.

Keegan Respondents cite other cases, urging this case as a candidate to speak to Establishment Clause issues. *See, e.g.* p. 10, n.9, discussing additional cases, including *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir., 1998), *cert. denied*, No. 98-1509, 14 June 1999; and *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom., Mitchell v. Helms*, No. 98-1648, 14 June 1999. These are presumably cited, again, to attempt to convince the Court that there is a burgeoning group of cases having relevant factual similarity. But both of these cases are quite different from this one, and the existence of those cases does not call for the acceptance of this case. Indeed, the grant of *certiorari* in *Mitchell* counsels a denial of *certiorari* in this case.

Columbia Union, supra, raised an issue similar to the *Bagley* and *Strout* Maine cases—whether a Columbia Union College exclusion from direct financial tuition aid because of its religious status is compelled by the Establishment Clause. However, the Fourth Circuit's decision turned upon the applicability of the principle in *Roemer*

v. Board of Public Works of Maryland, 426 U.S. 736 (1976) that irrespective of the constitutionality of aid to colleges that are merely "affiliated" with their religious order, such aid cannot be given to a college which is "pervasively sectarian." The Fourth Circuit remanded to determine the pervasiveness issue. There is no remotely similar issue before the Court in this case. However, *Columbia* does reinforce that the opinion below rightly noted *Mueller's* teaching that it is not appropriate in cases like this, to try to divine through statistics about periodic rates at which aid schemes benefit a greater or smaller percentage of sectarian schools, to measure the constitutionality of the program. *Accord, Agostini, supra*, 521 U.S. at 203, 237 (1997).

The lack of necessity, measured by any criteria, to grant *certiorari* in this case is emphasized by this Court's grant of *certiorari* in *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom., Mitchell v. Helms*, No. 98-1648, 14 June 1999. In *Helms*, the Fifth Circuit upheld the constitutionality of a shared education program, which provided much more direct benefit and considerably more entanglement, than is posed by this case. The Fifth Circuit did so based upon more recent cases of this Court including *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) and *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). And it did so even though the programs were more broad-based than either *Zobrest* or *Witters*. And in a second issue the Fifth Circuit struck down Title I programs calling for direct aid to private schools including secular schools, for the loan of equipment. On that issue, the Fifth Circuit, while acknowledging the evolution of Establishment Clause law, complied with this Court's dictate in, *inter alia, Agostini, supra*, that if a precedent of this Court has direct application in a case but yet appears to rest on reasons rejected in more recent cases of this Court, the Court of Appeals must necessarily

follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. The Fifth Circuit therefore struck down the loan-of-equipment program, following *Meek v. Pittenger*, 421 U.S. 349 (1975) which invalidated the Pennsylvania instructional equipment loan program.

Review of the *Helms v. Picard* case will provide this Court with a broad-based controversy, in which the Fifth Circuit validated some things and invalidated others. This case can really add nothing by way of significant, recurring, facts of direct monetary benefits, provision of services, or equipment. The grant of *certiorari* in *Mitchell* is sufficient.

V. WHILE SCHOOL CHOICE TRUST RAISED BELOW THE ISSUE OF PUTTING ASIDE THE *LEMON v. KURTZMAN* TEST, AND WOULD NECESSARILY RAISE IT HERE, RECONSIDERING *LEMON v. KURTZMAN* IS NOT NECESSARY FOR A CORRECT DECISION OF THIS CASE AND DOES NOT PROVIDE A REASON TO GRANT CERTIORARI IN THIS CASE.

Before the Arizona Supreme Court, School Choice Trust urged that a careful reading of the substance of the *Lemon v. Kurtzman* test sufficed to validate the school tuition donation tax credit law. Response of Intervenor Arizona School Choice Trust, Inc. to Petition for Special Action, p. 14 (hereinafter "School Choice Trust Response"). However, it went on to note that *Lemon v. Kurtzman* has been roundly criticized, *e.g. Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 718-721 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 750-751 (Scalia, J., dissenting); *Rosenberger v. Rector*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). School Choice Trust Response at pps. 15, 16. School Choice Trust then urged that fundamental Establishment Clause principles derived from the

jurisprudence of the previous 25 years, applied outside of a mechanistic formula, supported the constitutionality of the school tuition donation tax credit law. Such fundamental principles, urged upon the Arizona Supreme Court, included prohibition against government "sponsorship, support or active involvement;" neutrality to religion, not hostility toward it; prohibition against significant and symbolic benefit; neutrality among and between religious and between them and non-religions; equal treatment of religions; and discerning whether the government acted with the purpose of advancing or inhibiting religion. School Choice Trust Response, pps. 16-20.

The Arizona Supreme Court in its decision, while acknowledging that "other approaches have been considered by the court,"[17] concluded that the well settled *Lemon* standards provided an appropriate framework for review, Petition A-7, and as already discussed, did review and affirm the constitutionality based upon the *Lemon* standards.

While School Choice Trust believes that the statute can be validated under both *Lemon* and a less mechanistic and more value-based mode of review, and will make the argument in this case that *Lemon v. Kurtzman* should be reconsidered if necessary to affirm,[18] it asserts that the validity of this Act is so clearly apparent, and that the facts of this case are so clearly out of the main stream of the "school voucher" and similar kinds of cases, that review is not warranted.

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[17] For example, the Court cited, Petition A-5, Kristin M. Engstrom, Comment, Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test, 27 Pac. LJ 121 (1995).

[18] *South Central Bell Telephone Co. v. Alabama*, —— U.S. ——, 119 S.Ct. 1180, 1186 (1999).

CONCLUSION

Arizona School Choice Trust is the one party which suffers the most, and most directly, from the continuing pendency of this case. Notice that in the list of Rhodes Petition's schedule of 1998 private school tuition organizations, donations to them, and scholarships granted by them in the calendar year 1998, that School Choice Trust is not listed at all. Petition A-98. This is because, in fairness to donors, School Choice Trust did not feel it could conduct its operations during the past year while the case has been before the Arizona Supreme Court with School Choice Trust as a party. It is of great importance to School Choice Trust that this case be dispatched forthwith by denial of review. For reasons we have set forth above, there is no good reason to "hold" this case for the decision in the *Helms v. Picard* case.

Accordingly, it is respectfully requested that *certiorari* be denied.

Respectfully submitted,

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June 1999